IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND, et al.	:	CIVIL ACTION
v.	:	
PHILIP MORRIS, INCORPORATED, et al.	:	NO. 97-5344

MEMORANDUM AND ORDER

Fullam, Sr. J. April , 1998

The named plaintiffs are a group of seven union welfare funds ("the Funds"), acting on behalf of themselves and a class consisting of all other union welfare funds in Pennsylvania. They have brought this action against eight major tobacco companies, four public relations firms and trade associations which allegedly provide lobbying services for the tobacco industry. Plaintiffs seek damages measured by the increased health benefits liabilities the Funds have incurred because of tobacco-related illnesses suffered by their participating union members. They also seek injunctive relief to require the defendants to finance certain remedial efforts in the future.

Plaintiffs' complaint asserts claims for RICO violations (Counts I and II), violations of the Sherman Antitrust Act (Count III), claims based upon alleged fraud and concealment (Count IV), claims for breach of a special duty (Count V) and claims for unjust enrichment (Count IX). The complaint also included claims based upon strict liability (Count VI), negligence (Count VII) and breach of warranties (Count VIII), but

plaintiffs have now expressed an intention to withdraw this latter group of claims "without prejudice."

The defendants have filed a motion to dismiss the entire complaint, and the parties have agreed that, until this motion is decided, all other aspects of the litigation will be held in abeyance.

Plaintiffs' encyclopedic complaint extends to 115 pages, and includes 317 paragraphs. It traces the entire history of the marketing of cigarettes and other tobacco products in this country, from 1881 to date, and charges the defendants with a lengthy catalogue of malfeasances in their efforts to promote harmful tobacco consumption, to mislead the public about the dangers of smoking, to suppress research which demonstrated the causal relationship between smoking and various diseases, and to avoid developing a safer cigarette product. Plaintiffs further allege that, because of defendants' successful efforts to conceal their wrongdoing, all applicable statutes of limitation have been tolled until "quite recently"; thus, apparently, plaintiffs seek to recover all sums which they have expended for medical expenses associated with treating tobacco-related illnesses, from the inception of each of the plaintiff Funds to date.

In support of their motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), defendants mount various arguments which apply to all counts of the complaint, and other arguments which address certain individual counts. These arguments will be addressed in that order.

I. Issues common to all counts of the Complaint

A. Causation - proximate or remote?

Accepting as true all of the factual averments of plaintiffs' complaint, the defendants' activities have directly injured individual workers, causing them to incur medical expenses which have been paid by the plaintiffs. But, as the defendants correctly point out, the general rule has long been established that one who pays the medical expenses of an injured party does not have a direct claim against the tortfeasor who caused the injury. See e.g., Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 532 n.25 (1983); United States v. Standard Oil Company of California, 332 U.S. 301, 314, 67 S.Ct. 1604, 1611 (1947). The medical expenses incurred in treating an injury or illness caused by a tortfeasor are an integral part of the claim of the injured party against the tortfeasor, and cannot be separately asserted by the payor, except perhaps by way of subrogation.

In the present case, plaintiffs expressly disclaim any intention to assert a subrogation claim - presumably, among other reasons, to avoid the need to identify and prove the thousands of individual cases involved. Plaintiffs also concede that, if the defendants' liability were predicated upon negligence concepts, the damages sustained by plaintiffs would not be regarded as having been proximately caused by the defendants' conduct, but rather would be too remote and indirect. They argue, however, that these causation arguments are not applicable to their RICO,

fraud, and other claims asserting intentional wrongdoing on the part of the defendants.

I am not persuaded that, on the issue of proximate cause, there is any significant difference among the various kinds of claims asserted in this case. I need not dwell upon this issue, however, because I conclude that all of plaintiffs' claims suffer from an even more fundamental flaw, namely, the fact that plaintiffs have not suffered any cognizable damages.

As the complaint carefully points out, all of the plaintiffs are non-profit, tax-exempt corporations. The funds which they use to pay the medical expenses of their members are obtained from the members' employers, through collective bargaining negotiations. Plaintiffs assert that the money in question really belongs to the workers, because the employers' contributions to the funds really constitute a payment of a portion of the employees' wages.

But whether the contributions are properly attributed to the employer or the participating workers, it is clear that plaintiffs' own economic interests were not affected by the payments. The fact that the medical costs paid out of these funds increased because of defendants' wrongdoing caused no harm to plaintiffs; it merely meant that the unions negotiated a greater level of contributions from the employers.

Another appropriate analytical approach is to analogize this situation to that of a life insurance company. No one would seriously suggest that a life insurance company which pays the

policy proceeds because its insured was killed could successfully sue a tortfeasor for causing the death. This is not only because any such claim would be entirely indirect and remote, but because the insurance company's premium structure is predicated upon actuarial assumptions and predictions concerning mortality rates of populations; the death of individual policyholders is precisely the risk the company agreed to assume. A tortfeasor cannot be held liable for merely providing partial fulfillment of actuarial predictions.

Plaintiffs' reliance upon the continued pendency of the various lawsuits brought by state attorneys general or other governmental entities to recover increased Medicaid disbursements attributable to tobacco-related illnesses, such as State of Minnesota, et al. v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996), is misplaced. In all those cases (the numerous unreported decisions are cited in plaintiffs' initial brief at page 14, and are collected in plaintiffs' appendix, but will not be listed here), the plaintiffs were the entities which actually paid the increased medical costs from their own funds. In our case, plaintiffs are merely handling the payments with money provided by others, and have no genuine stake in the matter.

It should be noted that a reduction of the medical costs payable by plaintiffs would not inure to plaintiffs' benefit. The money in their hands can only be used to pay benefits on behalf of others, and, since all are non-profit entities, plaintiffs cannot claim to have suffered any economic

loss in the form of lost profits. I therefore conclude that, as to all counts of the complaint, the complaint fails to set forth claims upon which relief can be granted.

B. Additional Issues

1. Antitrust Claims

Irrespective of the correctness of the conclusions thus far expressed, it is clear that Count III, which charges violations of the Sherman Act, 15 U.S.C. §1, must be dismissed. Plaintiffs do not have antitrust standing, and they allege no injury of the sort the antitrust laws were designed to prevent.

2. Fraud, Misrepresentation and Concealment

Count IV is vulnerable to dismissal for the further reason that the defendants are not alleged to have made any representations to the plaintiffs, as distinguished from the general public. Moreover, the only form of reliance alleged in the complaint is the assertion that, because the defendants misrepresented the true characteristics of tobacco and concealed the dangers of smoking, plaintiffs were lulled into inaction, whereas, if they had known what the defendants knew and should have disclosed, they might have been able to prevent or reduce tobacco-related diseases among their participants. In my view, claims based on this theory are entirely too speculative to be taken seriously.

3. Injunctive Relief

Plaintiffs seek to compel the defendants to

institute remedial measures to educate the participants in plaintiffs' funds, and the public generally, about the dangers of tobacco; to furnish nicotine patches or other devices to assist smokers to stop smoking, to develop safer cigarettes, etc. While plaintiffs' apparent desire to be helpful to its members and to society in general is commendable, plaintiffs simply do not have legal standing to advance such claims, which really belong to the individuals affected. Moreover, all such matters are within the province of Congress or the state legislatures. Judges are not authorized to legislate, by issuing injunctions or otherwise.

4. Failure to Perform a Special Duty

In Count V, the plaintiffs allege that, through various advertising statements, the defendants assumed a special duty "to protect the public health and a duty to those who advance the public health," which obliged the defendants to cooperate with public health officials, assist in research efforts into the health effects of smoking, disclose complete and accurate information about the health effects of smoking, etc. Such claims have received short shrift in the reported decisions. See Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1157 (E.D. Pa. 1987) (advertising statements cannot give rise to a special duty); Lower Lake Dock Co. v. Messinger Bearing Corp., 577 A.2d 631, 635 (Pa. Super. Ct. 1990) ("special duty" theory applies only to physical harm, not economic injury). Indeed, the tort alleged in this count is defined in Restatement (Second) Torts

§§ 323 and 324A as being restricted to "physical harm" which is defined as "physical impairment of the human body, or of land and chattels." Count V must therefore be dismissed for this additional reason.

5. Unjust Enrichment

Finally, Count IX, which alleges a claim for unjust enrichment, is also subject to dismissal. Plaintiffs allege that, by paying medical expenses caused by tobacco-related illnesses, they relieved defendants of their obligation to pay such medical costs, and therefore defendants have been unjustly enriched to the extent of those payments. In my view, this is simply a subrogation claim expressed in different language. Plaintiffs have disavowed any wish to assert subrogation claims, and, as discussed above, such claims cannot be asserted independently of the individual claims for personal injuries. It should also be noted that in states which preclude a tortfeasor from reducing damage awards by showing that plaintiff has received payment from a "collateral source," there would be an unacceptable risk of double payment if plaintiffs were permitted to pursue subrogation independently.

C. Defendants' Alternative Motion to Dismiss

Defendants have filed a separate additional motion to dismiss the complaint, for failure to join indispensable parties; in essence, defendants are merely reiterating that plaintiffs

have no valid claims of their own which can be asserted independently of the claims of others, or that plaintiffs' lack standing to sue. The alternative motion need not be separately addressed.

D. Conclusion

Counsel for both sides are to be commended for their diligence, and for the exceptionally high quality of their briefs and pleadings. In the final analysis, however, the liability of the defendants for harm caused by their products and activities cannot be addressed or resolved in this lawsuit. If such claims are to be brought, they must be brought by the injured smokers or their survivors, or by state governments or other entities which actually suffered direct economic loss attributable to the defendants.

Since the obstacles identified above cannot be overcome by amending the complaint, leave to amend will not be granted. The complaint will be dismissed with prejudice, but, of course, without prejudice to plaintiffs' subrogation rights, if any.

Inasmuch as class certification has not yet been sought or granted, and putative class members have not been notified of this litigation, the dismissal now ordered applies only to the named plaintiffs; the class allegations will be stricken.

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ORDER

AND NOW, this day of April, 1998, IT IS ORDERED:

1. The class allegations are STRICKEN from the complaint.

2. Plaintiffs' complaint is DISMISSED in its entirety, WITH PREJUDICE.

3. The dismissal now ordered is WITHOUT PREJUDICE to plaintiffs' subrogation rights, if any, which may be asserted in litigation which may be brought on behalf of persons directly injured by defendants' products or activities.

4. The Clerk is directed to close the file.

John P. Fullam, Sr. J.